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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 704

IRENE MORGAN,

Appellant,

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

STATEMENT AS TO JURISDICTION

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INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Jurisdictional statute	1
Statute of Virginia, the validity of which is involved	2
Dates of judgment and of application for appeal	4
Nature of the case and rulings in the state courts	
Substantial character of questions involved	4
Cases supporting jurisdiction	12
Appendix "A"—Applicable Virginia Statutes	14
Appendix "B"—Opinion of the Supreme Court of Appeals	15

Table of Cases Cited

Anderson v. *Louisville & N. R. Co.*, 62 Fed. 46	17
Brown v. *Memphis & C. R. Co.*, 5 Fed. 499	12
Carrey v. *Spencer*, 36 N. Y. S. 886	12
Davis v. *Farmers Co-Operative Equity Co.*, 262 U. S. 312	12
Hall v. *DeCuir*, 95 U. S. 485	14
Hart v. *State*, 100 Md. 596	12
Kansas City Southern Ry. Co. v. *Kaw Valley Drainage District*, 233 U. S. 75	12
McCabe v. *Atchison, T. & S. F. Ry. Co.*, 186 Fed. 966	14
Missouri, Kansas & Texas Ry. Co. of Texas v. *Texas*, 245 U. S. 484	12
Seaboard Air Line Ry. Co. v. *Blackwell*, 244 U. S. 310	14
South Covington & Cincinnati, Chicago & St. L. Ry. Co. v. *Illinois*, 177 U. S. 514	14
Southern Pacific Co. v. *Arizona*, 65 S. Ct. 1516	14
St. Louis, San Francisco Railway Co. v. *Public Service Commission*, 261 U. S. 369	12
St. Louis Southwestern Ry. Co. v. *Arkansas*, 217 U. S. 136	14
State v. *Jenkins*, 124 Md. 376	12
State ex rel. Abbott v. *Hicks*, 44 La. Ann. 770	12

Page

Thompkins v. *Missouri, K. & T. Ry. Co.*, 211 Fed. 391 12

Washington, B. & A. Elec. R. Co. v. *Waller*, 53 App. D. C. 200, 289 Fed. 598 12

Statutes Cited

Constitution of the United States:
Article I, Section 8 5
14th Amendment 5
Michie's Code of Virginia, 1942:
Section 4097z 2
Section 4097aa 2
Section 4097bb 2, 3
Section 4097cc 2, 3
Section 4097dd 2, 3, 4
United States Code, Title 28:
Section 344a 1
Section 861a 1

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

OCTOBER TERM, 1945

No. 704

IRENE MORGAN,

Appellant,

vs.

COMMONWEALTH OF VIRGINIA,

Appellee

STATEMENT IN SUPPORT OF JURISDICTION

The appellant, Irene Morgan, in support of the jurisdiction of the Supreme Court of the United States to review the above-entitled cause on appeal, respectfully shows:

I

Jurisdictional Statute

The Supreme Court of the United States has jurisdiction to review this case on appeal under the provisions of Sections 344 (a) and 861 (a) of Title 28 of the United States Code because the highest court of the State of Virginia has rendered final judgment in this suit sustaining the validity of a criminal statute of the State after the validity of that statute had been brought into question by the person prose-

cuted thereunder, appellant here, on the ground of its being repugnant to the Constitution of the United States.

II

Statute of Virginia, the Validity of Which Is Involved

In 1930, the General Assembly of Virginia enacted a statute described by its title as "An Act to provide for the separation of white and colored passengers in passenger motor vehicle carriers within the State; to constitute the drivers of said motor vehicles special policemen, with the same powers given to conductors and motormen of electric railways by general law." (Acts of Assembly, 1930, Chap. 128, Pages 343-344.)

This statute, now appearing as Sections 4097z to 4097dd of Michie's Code of Virginia, 1942, requires all passenger motor vehicle carriers to separate the white and colored passengers in their motor busses, and to set apart and designate in each bus seats or portions thereof to be occupied, respectively, by the races, and constitutes the failure and refusal to comply with said provisions a misdemeanor (Sec. 4097z); forbids the making of any difference or discrimination in the quality or convenience of the accommodations so provided (Sec. 4097aa); confers the right and obligation upon the driver, operator or other person in charge of such vehicle, to change the designation so as to increase or decrease the amount of space or seats set apart for either race at any time when the same may be necessary or proper for the comfort or convenience of passengers so to do; forbids the occupancy of contiguous seats on the same bench by white and colored passengers at the same time; authorizes the driver or other person in charge of the vehicle to require any passenger to change his or her seat as it may be necessary or proper, and constitutes the

failure or refusal of the driver, operator or other person in charge of the vehicle, to carry out these provisions a misdemeanor (Sec. 4097bb); constitutes each driver, operator or other person in charge of the vehicle, while actively engaged in the operation of the vehicle, a special policeman, with all of the powers of a conservator of the peace in the enforcement of the provisions of this statute, the maintenance of order upon the vehicle, and while in pursuit of persons for disorder upon said vehicle, for violating the provisions of the act, and until such persons as may be arrested by him shall have been placed in confinement or delivered over to the custody of some other conservator of the peace or police officer, and protects him against the consequences of error in judgment as to the passenger's race, where he acts in good faith and the passenger has failed to disclose his or her race (Sec. 4097cc). Section 4097dd, upon which the prosecution in this case was based, reads as follows:

> "All persons who fail while on any motor vehicle carrier, to take and occupy the seat or seats or other space assigned to them by the driver, operator or other person in charge of such vehicle, or by the person whose duty it is to take up tickets or collect fares from passengers therein, or who fail to obey the directions of any such driver, operator or other person in charge, as aforesaid, to change their seats from time to time as occasions require; pursuant to any lawful rule, regulation or custom in force by such lines as to assigning separate seats or other space to white and colored persons, respectively, having been first advised of the fact of such regulation and requested to conform thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars nor more than twenty-five dollars for each offense. Furthermore, such persons may be ejected from such vehicle by any driver, operator or person in charge of said vehicle, or by any police officer or other con-

servator of the peace; and in case such persons ejected shall have paid their fares upon said vehicle, they shall not be entitled to the return of any part of same. For the refusal of any such passenger to abide by the request of the person in charge of said vehicle as aforesaid, and his consequent ejection from said vehicle, neither the driver, operator, person in charge, owner, manager nor bus company operating said vehicle shall be liable for damages in any court." (The full text of the statute involved is set forth in Appendix A attached hereto.)

III

Dates of Judgment and of Application for Appeal

The date of the judgment of the Supreme Court of Appeals of Virginia which is now sought to be reviewed was June 6, 1945. Appellant filed a timely Petition for Rehearing and this Petition was denied on September 4, 1945. Application for Appeal was duly presented on November 19, 1945, and the Appeal was allowed on November 19, 1945.

IV

Nature of the Case and Rulings in the State Courts

The appellant was tried in the Circuit Court of the County of Middlesex, Virginia, upon an amended warrant charging that on the 16th day of July, 1944, she did "Unlawfully refuse and fail to obey the direction of the driver or operator of the Greyhound Bus Lines to change her seat and to move to the rear of the bus and occupy a seat provided for her, in violation of section 5 of the Act, Michie Code of 1942, section 4097dd." She was found guilty, by the trial judge sitting without a jury and on October 18, 1944, was sentenced to pay a fine of $10.00. There is no substantial dispute concerning the facts with reference to this charge. On July 16, 1944, appellant, who is a Negro (R. 30, 39), was a passen-

ger on a bus of the Richmond Greyhound Lines, Inc., traveling from Hayes Store in Gloucester County, Virginia, to Baltimore, Maryland (R. 30, 39), on a through ticket purchased by her from said company (R. 32, 33, 39). The vehicle itself was traveling on a continuous and through trip from Norfolk, Virginia to Baltimore, Maryland, via Washington, D. C. (R. 32). During this journey, at Saluda, Virginia, the driver of the bus, a regular employee of the Richmond Greyhound Lines, Inc., in charge and control of the bus (R. 30, 32, 39) directed appellant to remove from the seat which she was occupying in the front of the bus to a seat in the rear pursuant to a design to segregate white and colored passengers in accordance with the herein and above-cited statute of Virginia. Appellant refused to move, whereupon the driver procured a warrant and caused her to be arrested upon a charge of violating the segregation law and particularly section 4097dd, herein above quoted. Upon this charge she was tried and convicted.

In the trial court, appellant duly raised and preserved by appropriate exceptions her objection that the statute in question is invalid because it is repugnant to the Constitution of the United States. Specifically by motion to strike the evidence of the Commonwealth, by motion to set aside the decision and arrest the judgment of guilt, and by motion for a new trial, appellant duly asserted her claim that the statute in question could not be made applicable to this case without violation of Section 8 of Article 1 of the Constitution of the United States, and that the conviction of appellant under the circumstances of this case constituted a violation of her rights under the Fourteenth Amendment of the Constitution of the United States. Bill of Exception No. 2 (R. 48, 49), Bill of Exception No 3 (R. 49-50) and Bill of Exception No. 4 (R. 50-51) as signed by the trial

judge and embodying these matters, are in the following language:

"BILL OF EXCEPTION No. 2

"Be it remembered that on the trial of this case when the Commonwealth had completed its presentation of its evidence-in-chief and had rested, the defendant moved to strike all of the evidence of the Commonwealth and to dismiss the case upon the grounds that the evidence introduced by the Commonwealth was legally insufficient to sustain a conviction of the crime charged in the amended warrant, upon which she was being tried, and that no judgment thereupon could lawfully be rendered against her, for the following reasons, to-wit: that the law upon which the prosecution was based could not constitutionally be applied to the defendant who was, as shown by the evidence of the Commonwealth, an interstate passenger, traveling upon the vehicle of an interstate public carrier, and that its application to such a passenger would be in violation of Article 1, Section 8, of the Constitution of the United States; and that under settled rules of construction said law could not be construed to apply to a passenger in interstate commerce, and that it must be construed as limited in its operation to passengers in intrastate commerce.

"The Court overruled said motion, to which action of the Court the defendant thereupon excepted.

"At the conclusion of the case when both the Commonwealth and the defendant had rested, the defendant renewed her motion to strike all the evidence of the Commonwealth, and to dismiss the case, upon the ground that the evidence introduced by the Commonwealth was legally insufficient to sustain a conviction of the crime charged in the amended warrant, upon which she was being tried, and that no judgment thereupon could lawfully be rendered against her, for the following reasons, to-wit: that the law upon which the prosecution was based could not constitutionally be applied to the defendant who was, as shown by the

evidence both for the Commonwealth and the defendant, an interstate passenger, traveling upon the vehicle of an interstate public carrier, and that its application to such a passenger would be in violation of Article 1, Section 8, of the Constitution of the United States; that under settled rules of construction said law could not be construed to apply to a passenger in interstate commerce, and that it must be construed as limited in its operation to passengers in intrastate commerce; and that the conviction of the defendant would, under the circumstances of this case, constitute a violation of her rights under the Fourteenth Amendment of the Constitution of the United States. The Court overruled said motion, to which action of the Court the defendant thereupon excepted, and tendered this her Bill of Exception No. 2 on the 27th day of November, 1944, and prayed that the same be signed, sealed and enrolled as a part of the record in this case, which is accordingly done this 7th day of December, 1944.

J. Douglas Mitchell, (Seal)
Judge of the Circuit Court of Middlesex County."

"Bill of Exception No. 3

"Be it remembered that on the trial of this case the Commonwealth and the defendant, to sustain their several issues, introduced several witnesses who testified as fully set forth in the statement of testimony certified by the Honorable J. Douglas Mitchell, Judge of the Circuit Court of Middlesex County, Virginia, who presided at the trial (said certificate and statement of testimony being contained and set forth at length in defendant's Bill of Exception No. 1, and asked to be read as if here inserted), and which evidence was presented to the Court, trial by jury having been waived, and after hearing the same and at the conclusion thereof, the Court decided that the defendant was guilty of the charge set forth in the amended warrant upon which she was tried, to-wit: 'that the defendant did unlawfully refuse and fail to obey the direction of the driver or operator of the Greyhound Bus Lines to

change her seat and move to the rear of the bus and occupy a seat provided for her, in violation of section 5 of the Act, Michie Code of 1942, section 4097dd.'

"Whereupon the defendant moved the Court that said judgment be set aside and a new trial be awarded the defendant, and that the Court arrest judgment therein and not pronounce the same, on the grounds that no judgment could lawfully be rendered against her in this case, for the following reasons, to-wit: that the law upon which the prosecution was based could not constitutionally be applied to the defendant, an interstate passenger, traveling upon the vehicle of an interstate public carrier, and that its application to such a passenger was in violation of Article I, Section 8, of the Constitution of the United States; that under settled rules of construction said law could not be construed to apply to a passenger in interstate commerce, and that it must and should be construed as limited in its operation to passengers in intrastate commerce; that the conviction of the defendant would, under the circumstances of this case, constitute a violation of her rights under the Fourteenth Amendment of the Constitution of the United States; and that said finding and verdict were contrary to the evidence, and lacking in evidence sufficient to support the same.

"The Court overruled said motion, to which ruling and action of the Court the defendant thereupon excepted, and tendered this her Bill of Exception No. 3 on the 27th day of November, 1944, and prayed that the same be signed, sealed and enrolled as a part of the record in this case, which is accordingly done this 7th day of December, 1944.

J. Douglas Mitchell, (Seal)
Judge of the Circuit Court of Middlesex County."

"Bill of Exception No. 4

"Be it remembered that on the trial of this case the Commonwealth and the defendant, to sustain their several issues, introduced several witnesses who testified as fully set forth in the statement of testimony

certified by the Honorable J. Douglas Mitchell, Judge of the Circuit Court of Middlesex County, Virginia, who presided at the trial (said certificate and statement of testimony being contained and set forth at length in the defendant's Bill of Exception No. 1, and asked to be read as if here inserted), and which evidence was presented to the Court, trial by jury having been waived, and after hearing the same and at the conclusion thereof, the Court decided that the defendant was guilty of the charge set forth in the amended warrant upon which she was tried, to-wit: that the defendant did 'Unlawfully refuse and fail to obey the direction of the driver or operator of the Greyhound Bus Lines to change her seat and move to the rear of the bus and occupy a seat provided for her, in violation of section 5 of the Act, Michie Code of 1942, section 4097dd.'

"Whereupon, and after the Court had overruled the defendant's motion to set aside said judgment, as set forth in detail in defendant's Bill of Exception No. 3, and asked to be read as if here inserted, the defendant moved the Court to award her a new trial, and that the Court arrest judgment therein and not pronounce the same, upon the same grounds and for the same reasons assigned in support of her prior motion to set aside the said judgment, as set forth at length in defendant's Bill of Exception No. 3, to which reference is hereby made for the grounds and reasons assigned in support of this her motion for a new trial, and asked to be read as if here inserted.

"The Court overruled said motion, to which ruling and action of the Court the defendant thereupon excepted, and tendered this her Bill of Exception No. 4 on the 27th day of November, 1944, and prayed that the same be signed, sealed and enrolled as a part of the record in this case, which is accordingly done this 7th day of December, 1944.

J. Douglas Mitchell, (Seal)
Judge of the Circuit Court of Middlesex County."

On writ of error to the Supreme Court of Appeals of Virginia, the issues thus raised were duly presented to said court by the following assignment of errors (R. 2-3):

"First: The action of the Court in overruling petitioner's motion, first made at the conclusion of the presentation of the Commonwealth's evidence-in-chief, to strike the evidence of the Commonwealth and dismiss the case upon the ground that the evidence introduced by the Commonwealth was legally insufficient to sustain a conviction of the crime charged in the amended warrant, upon which she was being tried and that no judgment thereupon could lawfully be rendered against her, for the following reasons, to-wit: that the law upon which the prosecution was based could not constitutionally be applied to her as she was, as shown by the evidence, an interstate passenger travelling upon the vehicle of an interstate public carrier, and that its application to such a passenger would be in violation of Article I, Section 8, of the Constitution of the United States; and that under settled rules of construction said law could not be construed to apply to a passenger in interstate commerce, and that it must be construed as limited in its operation to passengers in intrastate commerce; which motion was renewed and again overruled at the conclusion of the entire case after both the Commonwealth and your petitioner had rested.

"Bill of Exception No. 2, Record pp. 34-35.

"Second: The action of the Court in overruling petitioner's motion to set aside said Court's decision and judgment of her guilt of the aforesaid offense, and to award her a new trial, which motion was predicated upon the same grounds and reasons aforesaid, and upon the additional ground and reason that said decision and judgment of her guilt was contrary to the evidence, and lacking in evidence sufficient to support the same.

"Bill of Exception No. 3, Record pp. 36-37.

"Third: The action of the Court in overruling petitioner's motion for a new trial, which motion was pred-

icated upon the same grounds and reasons aforesaid, and upon the additional ground and reason that said Court's decision and judgment of her guilt was contrary to the evidence, and lacking in evidence sufficient to support the same.

"Bill of Exception No. 4, Record pp. 38-39."

In the Supreme Court of Appeals of Virginia the decision of the trial court was affirmed by the judgment which is the subject of the present appeal. The following excerpts from the Opinion of the Supreme Court of Appeals (a full copy of which appears as Appendix B, attached hereto) show that these issues were considered and adjudicated and that the decision was in favor of the validity of the statute in question:

"There are two questions presented by the assignments of error. First, is the statute upon which the defendant was prosecuted, if construed as applicable to a passenger in interstate commerce, constitutional? * * * (184 Va. 28)

"Under the tenth amendment there is reserved to the States the right to exercise the police power. The State may enact legislation under the authority of the police power, even though such legislation may incidentally affect interstate commerce.

"The Virginia segregation statutes have been enacted under the police power of the State reserved to it in the tenth amendment to the U. S. Constitution. * * * (184 Va. 31)

"We are of the opinion the statute does not result in a discrimination against either the white or the Negro race, and that it does no violence to the fourteenth amendment to the U. S. Constitution." * * * (184 Va. 39)

"Our conclusion is that the statute challenged is a reasonable police regulation and applies to both intrastate and interstate passengers. It is not obnoxious to the commerce clause of the Constitution.

"The judgment is affirmed. * * *" (184 Va. 39)

V

Substantial Character of Questions Involved

The appellant respectfully shows that the questions involved in her appeal are of a substantial nature.

The decision of the state court in this case is in conflict with the doctrine of *Hall* v. *De Cuir*, 95 U. S. 485, and reaffirmation of the doctrine of that case in the opinion of Mr. Chief Justice Stone in *Southern Pacific Co.* v. *Arizona*, 65 Sup. Ct. 1516, decided June 18, 1945: "the commerce clause has been filed to invalidate local 'police power' enactments—regulating the segregation of colored passengers in interstate trains, *Hall* v. *De Cuir*" (65 Sup. Ct. at 1526).

The decision of the state court in this case is in conflict with the conclusion uniformly reached by the inferior courts of the United States and by the majority of state courts that statutes requiring the racial segregation of passengers on public carriers cannot be enforced as to passengers and vehicles moving in interstate commerce.

Washington, B. & A. Elec. R. Co. v. *Waller*, 53 App. D. C. 290, 289 Fed. 598;

Thompkins v. *Missouri, K. & T. Ry. Co.* (C. C. A. 8th), 211 Fed. 391;

McCabe v. *Atchison, T. & S. F. Ry. Co.* (C. C. A. 8th), 186 Fed. 966;

Anderson v. *Louisville & N. R. Co.* (C. C. Ky.), 62 Fed. 46;

Brown v. *Memphis & C. R. Co.* (C. C. Tenn.), 5 Fed. 499;

State v. *Jenkins*, 124 Md. 376;

Hart v. *State*, 100 Md. 596;

Carrey v. *Spencer* (N. Y. Sup. Ct.), 36 N. Y. S. 886;

State ex rel. Abbott v. *Hicks*, 44 La. Ann. 770.

The consequence of such a decision is to create confusion and uncertainty in the administration and regulation of

passenger travel by public carrier throughout the country. The obvious immediate effect of this decision is to make Virginia an island wherein local statutory regulation controls the seating of interstate passengers, surrounded by states where the existence of any such power has heretofore been denied. The very journey of appellant here began in Virginia, subject to the rule of this case to proceed through the District of Columbia and into Maryland where a contrary rule of law has prevailed. See *Washington, B. & A. Electric R. Co.* v. *Waller, supra; State* v. *Jenkins, supra.*

More generally, eighteen states have enacted "Civil Rights Acts" prohibiting racial segregation in places of public accommodations: California, Colorado, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Washington, Wisconsin. Also Maine and New Hampshire.

On the other hand some thirteen states provide by statute for some measure of racial segregation of passengers on public carriers: Alabama, Arkansas, Florida, Georgia, Kentucky, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and Virginia.

Unless the Supreme Court shall make clear in this case that these conflicting local statutes cannot be imposed upon interstate travel, serious and burdensome confusion must result. If Virginia is permitted in this case to refuse to be governed by the doctrine of *Hall* v. *De Cuir*, neither lawyers nor laymen, travelers nor carriers can have any assurance of what to expect or what to do with reference to travel through states with varying local policy on racial segregation. Even those states which have felt constrained to respect the mandate of *Hall* v. *De Cuir* must now consider themselves free to impose local notions of policy in this field if Virginia is permitted to do so.

VI

Cases Supporting Jurisdiction

Resort to and review in the Supreme Court of the United States has consistently been by and pursuant to the procedure of Appeal where statutory impositions of a state have been challenged as repugnant to the commerce clause. Most recently, in *Southern Pacific Co. v. Arizona, supra*, such a controversy was reviewed on appeal. Similar precedents are numerous. *Hall v. De Cuir, supra; South Covington & Cincinnati, Chicago & St. Louis Ry. Co. v. Illinois*, 177 U. S. 514; *St. Louis, San Francisco Railway Co., et al. v. Public Service Commission*, 261 U. S. 369; *Missouri, Kansas & Texas Ry. Co. of Texas, et al. v. Texas*, 245 U. S. 484; *St. Louis Southwestern Ry. Co. v. Arkansas*, 217 U. S. 136; *Davis v. Farmers Co-Operative Equity Co.*, 262 U. S. 312; *Seaboard Air Line Ry. Co. v. Blackwell*, 244 U. S. 310; see also *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District*, 233 U. S. 75.

WHEREFORE, appellant respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal.

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APPENDIX "A"

"Chap. 218—An ACT to provide for the separation of white and colored passengers in passenger motor vehicle carriers within the State; to constitute the drivers of said motor vehicles special policemen, with the same powers given to conductors and motormen of electric railways by general law. (H. B. 264.)

Approved March 20, 1930

1. Be it enacted by the general assembly of Virginia, That all passenger motor vehicle carriers, operating under the provisions of chapter one hundred and sixty-one-a of the Code of Virginia, shall separate the white and colored passengers in their motor busses and set apart and designate in each bus or other vehicle, a portion thereof, or certain seats therein, to be occupied by white passengers, and a portion thereof or certain seats therein, to be occupied by colored passengers, and such company or corporation, person or persons that shall fail, refuse or neglect to comply with the provisions of this section shall be guilty of a misdemeanor and upon indictment and conviction, shall be fined not less than fifty dollars nor more than two hundred and fifty dollars for each offense.

2. The said companies, corporations or persons so operating motor vehicle carriers shall make no difference or discrimination in the quality or convenience of the accommodations provided for the two races under the provisions of the preceding section.

3. The driver, operator or other person in charge of any motor vehicle above mentioned, shall have the right, and he is hereby directed and required at any time when it may be necessary or proper for the comfort and convenience of passengers so to do, to change the designation so as to increase or decrease the amount of space or seats set apart for either race; but no contiguous seats on the same bench shall be occupied by white and colored passengers at the same time; and said driver, operator or other person in charge of the vehicle, may require any passenger to change

his or her seat as it may be necessary or proper; the driver, operator or other person in charge of said vehicle who shall fail or refuse to carry out the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars nor more than twenty-five dollars for each offense.

4. Each driver, operator or person in charge of any vehicle, in the employment of any company operating the same, while actively engaged in the operation of said vehicle, shall be a special policeman and have all of the powers of conservators of the peace in the enforcement of the provisions of this act, and in the discharge of his duty as special policeman, in the enforcement of order upon said vehicle; and such driver, operator or person in charge of said vehicle shall likewise have the powers of conservators of the peace and of special policemen while in pursuit of persons for disorder upon said vehicles, for violating the provisions of this act, and until such persons as may be arrested by him shall have been placed in confinement or delivered over to the custody of some other conservator of the peace or police officer; and, acting in good faith, he shall be for the purposes of this chapter, the judge of the race of each passenger whenever such passenger has failed to disclose his or her race.

5. All persons who fail while on any motor vehicle carrier, to take and occupy the seat or seats or other space assigned to them by the driver, operator or other person in charge of such vehicle, or by the person whose duty it is to take up tickets or collect fares from passengers therein, or who fail to obey the directions of any such driver, operator or other person in charge, as aforesaid, to change their seats from time to time as occasions require, pursuant to any lawful rule, regulation or custom in force by such lines as to assigning separate seats or other space to white and colored persons, respectively, having been first advised of the fact of such regulation and requested to conform thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars nor more than twenty-five dollars for each offense. Further-

more, such persons may be ejected from such vehicle by any driver, operator or person in charge of said vehicle, or by any police officer or other conservator of the peace; and in case such persons ejected shall have paid their fares upon said vehicle, they shall not be entitled to the return of any part of same. For the refusal of any such passenger to abide by the request of the person in charge of said vehicle as aforesaid, and his consequent ejection from said vehicle, neither the driver, operator, person in charge, owner, manager nor bus company operating said vehicle shall be liable for damages in any court."

APPENDIX "B"

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Present: All the Justices.

Record No. 2974

IRENE MORGAN

v.

COMMONWEALTH OF VIRGINIA

Wytheville, Virginia, June 6, 1945

From the Circuit Court of the County of Middlesex. J. Douglas Mitchell, Judge

OPINION BY JUSTICE HERBERT B. GREGORY

The plaintiff in error was found guilty of a violation of section 4097dd of the Virginia Code (Michie), Acts 1930, p. 344, and fined $10 and costs. She attacks the judgment of the lower court upon the ground that the statute does not apply to her because she was an interstate passenger on an interstate bus and, if it does, it is unconstitutional.

The facts, briefly, are as follows: On July 16, 1944, the plaintiff in error, who will be hereinafter referred to

as the defendant, was a passenger upon a bus of the Richmond Greyhound Lines, Inc. She was a member of the Negro race, and had purchased a ticket at Hayes Store, in Gloucester county, Virginia, to Baltimore, Maryland. The bus on which she was riding was operated from Norfolk, Virginia, to Baltimore, Maryland. Upon arriving at Saluda, Middlesex County, Virginia, she was sitting in the second seat toward the front from the long seat in the extreme rear of the bus. There were two vacant spaces upon the long rear seat, and six white passengers were standing. The bus driver requested the defendant and her seatmate, another woman of the Negro race, to change their seats and occupy the two vacant spaces on the rear seat. The seatmate attempted to make the change but as she sought to arise she was pulled back by the defendant. The defendant refused to change her seat as requested. The bus driver explained to her the rules and regulations of the company as to seating colored and white passengers on buses, and informed her that he was required to seat white passengers from the front of the bus toward the rear and colored passengers from the rear of the bus forward.

Exhibit "A" sets forth the regulation of the company. It is in this language:

"T-22 RIGHTS RESERVED: This company reserves the right to refuse transportation to any and all persons for the following reasons:

"(c) This company reserves full control and discretion as to the seating of passengers and the right to change such seating at any time during the trip except on divisions or runs where specific seat reservations are made, in which case, passengers shall retain the seats assigned them unless same be contrary to any laws or governmental regulations."

Upon the refusal of the defendant to change her seat the driver of the bus caused a warrant to be sworn out for her. The sheriff and a deputy boarded the bus with the warrant and requested the defendant to change her seat. The sheriff attempted to read the warrant to her but she snatched

it out of his hand and threw it behind the seat. The woman seated beside the defendant moved but the defendant again refused to move, whereupon, the sheriff and his deputy arrested her and took her off the bus. When they attempted to remove her from the bus the defendant struck at the deputy but did not hit him. She kicked the sheriff three times on his leg, and reiterated that she would neither change her seat nor get off the bus. The officers placed her in jail.

In addition to being tried for a violation of sec. 4097dd, she was also tried at the same time for resisting arrest and found guilty upon that charge and adjudged to pay a fine of $100 and costs. She has not sought a writ of error to this judgment. The writ of error here is to the judgment of the court finding the defendent guilty of a violation of section 4097dd.

There are two questions presented by the assignments of error. First, is the statute upon which the defendent was prosecuted, if construed as applicable to a passenger in interstate commerce, constitutional? Second, should the statute upon which the defendent was prosecuted be construed as limited in its operation to passengers in interstate commerce, and therefore as inapplicable to the defendant?

The decisive questions present only questions of law. It is conceded by counsel for the defendant that the facts as found by the court below are binding upon the defendant.

Section 4097dd reads as follows:

"Violation by passengers; misdemeanor; ejection.—All persons who fail while on any motor vehicle carrier, to take and occupy the seat or seats or other space assigned to them by the driver, operator or other person in charge of such vehicle, or by the person whose duty it is to take up tickets or collect fares from passengers therein, or who fail to obey the directions of any such driver, operator or other person in charge, as aforesaid, to change their seats from time to time as occasions require, pursuant to any lawful rule, regulation or custom in force by such lines as to assigning separate seats or other space to white and colored persons, respectively, having been first advised of the fact of such regulation, and requested to conform thereto,

shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars nor more than twenty-five dollars for each offense. Furthermore, such persons may be ejected from such vehicle by any driver, operator or person in charge of said vehicle, or by any police officer or other conservator of the peace; and in case such persons ejected shall have paid their fares upon said vehicle, they shall not be entitled to the return of any part of same. For the refusal of any such passenger to abide by the request of the person in charge of said vehicle as aforesaid, neither the driver, operator, person in charge, owner, manager nor bus company operating said vehicle shall be liable for damages in any court."

In 1930 the General Assembly of Virginia enacted the statute known as Chapter 128, found in the 1930 Acts at pages 343 and 344. The title of the Act is "An Act to provide for the separation of white and colored passengers in passenger motor vehicle carriers within the State; to constitute the drivers of said motor vehicles special policemen, with the same powers given to conductors and motormen of electric railways by general law." The present Code sec. 4097dd is the latter portion of the Act.

The Act provides that all passenger motor vehicles operating under Chapter 161A of the Code shall segregate passengers according to color, and that any carrier failing to comply shall be fined.

The Act also provides that those so operating motor vehicles shall make no difference or distinction in the quality or convenience of the accommodations provided for the two races.

The Act further provides that the driver or operator or other person in charge of any motor vehicle above-mentioned shall have the right, and he is directed, to require at any time when it may be necessary or proper for the comfort or convenience of passengers so to do, to change the designation so as to increase or decrease the amount of space or seats set apart for either race, and that any driver or operator of a bus who shall fail or refuse to carry out the provisions of this section shall be guilty of a misdemeanor.

The Act further provides that the operator of such vehicle shall be a special policeman and have all the powers of a conservator of the peace in the enforcement of the provisions of the Act.

Then follows the latter portion of the Act now known as sec. 4097dd of the present Code (Michie), which has already been quoted.

It is conceded that on the bus upon which the defendant was riding there were provided equal facilities for both races, and that there was no difference or discrimination in the quality or convenience of the accommodations provided for the two races.

The Attorney General has made a motion to dismiss the writ of error, but the ultimate view of the court will render it unnecessary to pass upon that motion.

The public policy of the Commonwealth of Virginia, as expressed in the various legislative Acts, is and has been since 1900 to separate the white and Negro races on public carriers. As to railroads, see Acts of 1900, pages 236 and 237, carried in Michie's Code of 1942 as secs. 3962-3968; as to steamboats, see Acts of 1900, page 340, carried in Michie's Code 1942 as secs. 4022-4025; as to electric or street cars, see Acts of 1902-03-04, page 990, carried in Michie's Code 1942 as secs. 3978-3983, and as to motor vehicles see Act of 1930, pages 343 and 344, carried in Michie's Code of 1942 as secs. 4097z, 4097aa, 4097bb, 4097cc, and 4097dd.

So far as we are advised no case contesting the validity of any of these segregation Acts as applied to interstate passengers has been previously before this court, or any attempt made to repeal them.

Article I, sec. 8, clause 3, of the Constitution of the United States provides that Congress shall have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." And Article 10 of the amendments to the Constitution of the United States provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Under the tenth amendment there is reserved to the States the right to exercise the police power. The State may enact legislation under the authority of the police power, even though such legislation may incidentally affect interstate commerce.

The Virginia segregation statutes have been enacted under the police power of the State reserved to it in the tenth amendment to the U. S. Constitution.

Unless it is shown that the statute here challenged directly or unreasonably interferes with interstate commerce it is a valid enactment. There is no evidence in this case that the rule of the carrier or the statute under which it was promulgated does so. The burden of proof on this issue rested upon the defendant and she has failed to carry it. *Bourjois v. Chapman*, 301 U. S. 183, 57 S. Ct. 691, 81 L. Ed. 1027.

It must be borne in mind that here the carrier is not contending that interstate commerce is unreasonably burdened by the statute. It does not contend that the statute places any added expenses upon it or that it is inconvenienced or that it is against peace and good order to separate the races as it does under its rule. In fact the carrier was not even a party to this litigation.

The general rule is that if the enactment which requires the segregation of races according to color directly or unreasonably interferes with commerce it is not constitutional. *Hall v. DeCuir*, 95 U. S. 485, 24 L. Ed. 547; *McCabe v. Atchison, etc., R. Co.*, 235 U. S. 151, 35 S. Ct. 69, 59 L. Ed. 169. But unless the regulation unreasonably burdens commerce it is valid.

In *South Covington, etc., R. Co. v. Kentucky*, 252 U. S. 399, 40 S. Ct. 378, 64 L. Ed. 631, it was held that a Kentucky street railway may be required by statute of that State to furnish separate cars or separate compartments in the same car for white and Negro passengers, although its principal business is the carriage of pasengers in interstate commerce between Cincinnati, Ohio, and Kentucky cities across the Ohio river. It was held that such a requirement affects interstate commerce only incidentally and does not subject it to unreasonable demands.

It was also held in *Smith v. State*, 100 Tenn. (16 Pick.) 494, 46 S. W. 566, 41 L. R. A. 432; *Alabama, etc., R. Co. v. Morris*, 103 Miss. 511, 60 So. 11, Ann. Cas. 1915B, 613, and *Southern R. Co. v. Norton*, 112 Miss. 302, 73 So. 1, that State statutes providing for separate but equal accommodations for white and colored races on railroads are valid police regulations and that they apply both to intrastate and interstate travel. In these cases comment is made that the Supreme Court has not directly passed upon the validity of such statutes and that the ultimate settlement of the question rests with that court. It is also suggested in the *Morris Case* that until that court decides against the validity of such statutes, the court will be impelled to adhere to the belief that the law is not only beyond criticism from a constitutional standpoint but is also a reasonable and wise exercise of the police power of the State.

There are cases from several States which support the contention that a segregation statute is unconstitutional as respects interstate passengers. See *Hart v. State*, 100 Md. 595, 60 A. 457; *Carrey v. Spencer*, 72 N. Y. St. Rep. 108, 36 N. Y. S. 886; *Washington, etc., Elec. R. Co. v. Waller*, 53 App. D. C. 200, 289 F. 598, 30 A. L. R. 50. See also annotation in 30 A. L. R. at p. 55, where a number of cases are collected.

The defendant places strong reliance upon the case of *Hall v. DeCuir*, 95 U. S. 485, 24 L. Ed. 547. That case arose in 1877 under a Louisiana statute enacted in 1869 which required that no regulation of any carrier should make any discrimination on account of the race or color of the passenger. The plaintiff was a member of the Negro race and she sought accommodations on an intrastate journey in Louisiana on a steamboat operated by one Benson, which plied on the Mississippi river between New Orleans, Louisiana, and Vicksburg, Mississippi. She was refused accommodations in the cabin set apart for white persons, and sued Benson for damages as provided in the statute. He maintained that he was engaged in interstate commerce and that the Louisiana statute could have no application to him, and that he could promulgate any rules he desired. The Supreme Court of Louisiana held the statute applicable and

that it was not a regulation of interstate commerce. The case was appealed to the Supreme Court of the United States and there reversed, the Court holding that the statute was an unreasonable burden upon interstate commerce and therefore in violation of the Constitution.

The court found as a fact that the Louisiana Act was a direct interference with interstate commerce, while in the case at bar the challenged Act has not been shown nor found to be an interference with interstate commerce.

In the *Hall Case* it is apparent that the Louisiana Act was not enacted in pursuance of the police power of the State, while the Virginia Act was enacted under the police power.

It is also noted that the Louisiana statute prohibited the segregation of the races and that the rule of the carrier required such segregation, while in Virginia our statute not only requires separation of the races on public carriers but the carrier in this instance has a rule promulgated under the statute providing for the seating of passengers in the bus, and reserving to itself the right to change such seating at any time during the trip.

The Louisiana statute and the rule of the carrier were in direct conflict. To enforce the rule of the carrier would have been to violate the terms of the statute, while to enforce the terms of the statute would have been to violate the rule of the carrier. No such situation exists in Virginia. In the case at bar the rule of the carrier, instead of being at variance with the provisions of the statute, is entirely consistent with it—the rule having been made under the terms of the statute.

There is a conflict in the many cases dealing with State statutes which require the separation of the white and colored races by public carriers. No case from the Supreme Court of the United States has directly considered the issue raised in the case at bar. It is needless for us to refer to all of the cases or to attempt to discuss and distinguish them. Each case must largely depend upon its own facts, and if a statute results in imposing a direct or unreasonable burden upon interstate commerce it should be declared unconstitu-

tional. On the other hand, if it creates no such burden, it is not obnoxious to the Constitution.

In 11 Am. Jur., Commerce, section 8, the rule controlling the division and classification of powers is stated thus:

"The constitutional provision which confers upon Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes' grants all of the authority which the United States has over commerce. The respective powers of Congress and the States under this provision are divided into three fields: (1) That in which the authority of Congress is exclusive; (2) that in which the power of the State is exclusive; and (3) that in which the State may act in the absence of legislation by Congress. The line of division between Congressional and State Power over commerce is a question for judicial decision, depending upon the words of the Federal Constitution. * * *"

In *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204, 14 S. Ct. 1087, 38 L. Ed. 962, it was held that the adjudications of the Supreme Court of the United States with respect to the power of the States over the general subject of commerce are divisible into three classes: "First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all."

In the case at bar the defendant contends that Congress possesses the exclusive power in matters relating to interstate commerce, and that the States cannot act at all, while the Attorney General contends that the case at bar falls within the second class set out in the *Covington Case*, and that the State may act in the absence of legislation by Congress.

It appears that certain members of Congress have attempted to induce Congress to invade the so-called segregation field, but so far without success. On three occasions it has expressly refused to legislate on the subject. On January 5, 1938, Representative Mitchell introduced the following bill in Congress to amend U. S. C. title 49, sec.

3(1). (See H. R. 8821, Congressional Record, Vol. 83, part 1, p. 74):

"It shall be unlawful to segregate any persons traveling as interstate passengers on any carrier subject to the provisions of this Act, or in railroad stations, waiting rooms, rest rooms, lunch rooms, restaurants, dining cars, or in any other accommodations provided for passengers traveling interstate, on account of such passengers' race, color, or religion; and any such discrimination or attempted discrimination shall subject the offending carrier, its officers, agents, servants and employees, to the penalties hereinafter provided for violations of this Act."

This bill was referred to the Committee on Interstate and Foreign Commerce but was never reported out.

On January 3, 1939, the bill was re-introduced as H. R. 182, (Congressional Record, Vol. 84, part 1, p. 27), and again referred to the same committee. This committee was studying and developing the Interstate Commerce Act, and the Transportation Act of 1940, (Title 49 U. S. C. A., Transportation), was finally enacted, but the bill was not reported out nor were its provisions incorporated in any other measure.

On January 3, 1941, the bill was re-introduced as H. R. 112 (Congressional Record, Vol. 87, part 1, p. 13), and for the third time it was not reported out of committee.

There is now pending in the Committee on Interstate and Foreign Commerce a bill known as H. R. 1925, by which it is again sought to abolish segregation on public carriers. What the fate of this latest attempt will be, is, of course, not known.

This continued refusal of the Congress to legislate in the segregation field demonstrates its desire that the matter be left where it is now; that is, that the several States, under their police power, be permitted to continue to legislate in this field, subject only to the limitation that they shall not directly or unreasonably burden interstate commerce.

The Supreme Court has held that a State may tax interstate commerce even though it increases the cost of doing business. Even interstate business must pay its way. The

bare fact that one is carrying on interstate commerce does not relieve him from many forms of State taxation which add to the cost of his business.

In *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A.-L. R. 876, Mr. Justice Stone, speaking for the Court said: "Section 8 of the Constitution declares that Congress shall have power * * * to regulate commerce with foreign nations and among the several States. * * * In imposing taxes for State purposes a State is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the States or with foreign nations to an extent which infringes the authority conferred upon Congress that the tax can be said to exceed constitutional limitations." Citing cases.

And again the Justice said: "In few of these cases could it be said with assurance that the local tax does not, in some measure, affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the States with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the States shall not be unduly impeded by State action and that the power to lay taxes for the support of State government shall not be unduly curtailed."

Thus a State may tax interstate commerce and increase the costs of doing that business. Commerce is bound to be affected and burdened. However, under the case just referred to, as long as the State tax does not infringe the authority conferred upon Congress to regulate commerce among the several States, it is not invalid.

If State taxation statutes are constitutional even though they add to the cost of doing an interstate business, it would certainly seem logical that a segregation statute which is not shown to affect interstate commerce in any way, except perhaps to improve it, would also be valid. If the defendant here and her seatmate had complied with the rule of the carrier and had occupied the rear vacant seats assigned them, then two of the six white passengers could

have been seated. Thus complying with the rule of the carrier and the statute not only would not have directly or unreasonably impaired interstate commerce but it would have aided it.

It is conceded that in so far as the commerce clause is concerned the Virginia Act is valid, if restricted in its application to intrastate passengers. It is said that the Act is severable, and we are asked to so hold, and to invalidate it as to interstate passengers.

The language of the statute embraces all motor vehicles and all passengers, both interstate and intrastate. If the statute were held to be valid as to intrastate passengers and invalid as to interstate passengers, a condition would exist that would adversely disturb the peace and welfare. Then an interstate white passenger could occupy the rear seat with an intrastate Negro passenger, and an interstate Negro passenger could occupy a front seat with an intrastate white passenger. This would tend to confusion and disorder, and in effect, to allow the interstate Negro and white passengers to have the run of the entire bus, while confining the intrastate white and colored passengers to the front and rear of the bus, respectively. The result would be that the Segregation Act in its entirety would effectively be disrupted.

The point raised for the first time in the defendant's reply brief that the Act is not constitutional because it delegates legislative power to a private corporation brings into the case a question not raised in the pleadings in the court below or in the assignments of error or in the petition for the writ of error. It was not an issue in the case, and the attempt to inject it into the case for the first time by asserting it in the reply brief is violative of rule 22 of this court.

However, we do not think there would be any merit in the point if it had been properly raised. The statute, when read in its entirety, clearly demonstrates that no power is delegated to the carrier to legislate and determine what conduct shall be considered a crime. The statute simply describes conditions which must first be found to exist before it becomes applicable. There is no uncertainty about

the conditions that must exist before the offense is complete. The statute itself condemns the defendant's conduct as a violation of law and not the rule of the carrier. An interesting and exhaustive annotation on "Permissible Limits of Delegation of Legislative Power" is found in 79 L. Ed. of the U. S. Supreme Court Reports, beginning at page 274, following the case of *Panama Refin. Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446. At page 496 (79 L. Ed.) the specific point is discussed and the pertinent cases cited. They are: *Whaley v. State*, 168 Ala. 152, 52 So. 941, 30 L. R. A. (N. S.) 499; *Samuelson v. State*, 116 Tenn. (8 Cates) 470, 95 S. W. 1012, 115 Am. St. Rep. 805, and *In re O'Neill*, 41 Wash. 174, 83 P. 104, 3 L. R. A. (N. S.) 558, 6 Ann. Cas. 869.

In Virginia the statute demands equality of treatment of the white and Negro races by the carriers as well as equality in the facilities provided by the carriers for them. A statute which would permit inequalities in these respects would be invalid. Here the segregation statutes are enforced against the members of the white as well as against those of the Negro race. They must be enforced equally and without discrimination against both races. *Davis v. Commonwealth*, 182 Va. 760, 30 S. E. (2d) 709.

We are of the opinion the statute does not result in a discrimination against either the white or the Negro race, and that it does no violence to the fourteenth amendment to the U. S. Constitution (See *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256).

The silence of Congress on this subject places it in the "second" category outlined in *Covington, etc., Bridge Co. v. Kentucky, supra*, where the State is allowed to act in the absence of legislation in this field by Congress. If Congress desires to nullify State segregation statutes as applicable to interstate passengers it has the power to do so under the commerce clause. However, until Congress pre-empts this legislative field by proper enactment the States continue to have the right to segregate the white and colored races on public carriers. That Congress probably will not enter this field is evidenced by the fact that since January 5, 1938, for more than seven years it has refused to act

though at each session since then it has had the subject before it and has been urged to abolish segregation.

Our conclusion is that the statute challenged is a reasonable police regulation and applies to both intrastate and interstate passengers. It is not obnoxious to the commerce clause of the Constitution.

The judgment is affirmed.

Affirmed.

(2181)